Supreme Court, U.S.
FILED
NOV 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-607

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DIAMOND SHAMROCK CORPORATION,

Petitioner,

v.

JOHN HAMILTON, MARTHA FRANCIS, MORRIS A. RICHARDSON, ZINKE & TRUMBO, LTD., ROBERT M. ZINKE, and DAVID B. TRUMBO,

Respondents.

PETITIONER'S REPLY MEMORANDUM

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November 21, 1986

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PETITIONER'S REPLY MEMORANDUM[1]

Respondents, in their Brief in Opposition, assert that the Tenth Circuit properly ruled on the Order granting a new trial after the first trial with respect to all claims, including Diamond Shamrock's claim for well costs, Zinke & Trumbo's counterclaims for gross negligence and Hamilton, Francis, and Richardson's counterclaim for negligence. In short, Respondents have treated the certified interlocutory order in this case interchangeably with the certified final judgment involved only in a separate case. This attempt to treat the two interchangeably is an obvious attempt to hide

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[1] Diamond Shamrock Corporation's subsidiaries and affiliates are listed on p. ii of Diamond Shamrock's Petition for Writ of Certiorari filed in this case on October 14, 1986.

the fact that the Tenth Circuit decided issues in this appeal that were neither briefed by the parties nor properly before the Court.

Respondents fail to mention that Zinke & Trumbo did not purport to be a party to the appeal below and did not file any pleadings or briefs in the appeal below. Respondents also ignore the effect of the Fed.R.Civ.P. 54(b) certification on the final judgment. App. C to Petition for Certiorari, pp. 43a-44a. Fed.R.Civ.P. 54(b) provides:

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon express direction for the entry of judgment. . . ."

Under Rule 54(b) an order cannot be made final and appealable unless it completely disposes of an entire claim.[2] The claims upon which a certified final judgment was entered were Diamond Shamrock's claim, Zinke & Trumbo's counterclaim for gross negligence, and Hamilton, Francis and Richardson's counterclaim for negligence. Those claims were not subject to the certified interlocutory order involved in the appeal below. They were completely disposed of only in the final judgment subject to a separate appeal and should not have been decided by the panel below. This was

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[2] 6 J. Moore's *Federal Practice*, para. 54.30(1) at pp. 54-162–54-164 (1986).

recognized by the second panel of the Tenth Circuit which decided the appeal from the final judgment as shown by the opinion rendered in that separate appeal, which is attached to Respondents' Brief in Opposition to Diamond Shamrock's Petition for Writ of Certiorari as App. B, pp. 2-7.

The second panel addressed the propriety of denying Diamond Shamrock's Motion for Judgment Notwithstanding the Verdict after the first trial with respect to Zinke & Trumbo's counterclaim for gross negligence and Hamilton, Francis and Richardson's counterclaim for negligence. The propriety of the order granting a new trial after the first trial on those claims was not reviewable in the appeal below.

The fact that the claims completely disposed of by the final judgment involved in the separate appeal were not properly decided in the instant appeal is also shown by a review of the certified interlocutory order and the 54(b) certification on the final judgment (which provides that the judgment on the claims certified as final were "separate, distinct and independent from" Hamilton and Francis' counterclaims for breach of the implied covenants). This is also shown by a review of the issues raised, and the characterization of the certified interlocutory order, by Hamilton and Francis in their Petition for Permission to Appeal and Docketing Statement filed in the appeal below. App. M and N to Petition for Writ of Certiorari filed on October 14, 1986.

Thus, the Tenth Circuit departed from the usual course of judicial review by deciding issues involved in only the separate appeal from the final judgment.

Respectfully submitted,

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